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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN E. HOLMES,

Defendant and Appellant.

D069695

(Super. Ct. No. SCE353714;  
SCD261095; SCE351079;)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J.

Exarhos, Judge and Michael S. Groch, Judge. Affirmed.

Eric E. Reynolds, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Brian Holmes appeals a judgment in SCD261095 ('095), SCE351079 ('079), and SCE353714 ('714) after he pleaded guilty in all three cases to transporting, manufacturing, and/or possessing methamphetamine for sale (Health & Saf. Code,

§§ 11379, subd. (a), 11379.6, 11378).<sup>1</sup> Appointed appellate counsel filed a brief pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*) and *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We granted defendant Holmes an opportunity to file a supplemental brief on his own behalf, but he did not do so. After independently reviewing the entire record (*People v. Kelly* (2006) 40 Cal.4th 106, 119), we discern no arguable appellate issues and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Case No. SCD261095 ('095)*

On February 27, 2015, Holmes left his home and got into a pick-up truck driven by Edward Gudehus. San Diego County Sheriff's Department Detective Jamie Gomez, Jr., knew Holmes was on parole with a search condition and directed Deputy Allensworth to conduct a traffic stop. Following the stop, Detective Gomez searched Holmes and found \$509 in cash, one gram of methamphetamine, three syringes, and a smartphone in his pockets. The smartphone contained numerous text messages related to methamphetamine sales and a video of Holmes and Gudehus cooking methamphetamine in a garage. A search of Holmes's garage revealed precursor chemicals consistent with those used to make methamphetamine.

The San Diego County District Attorney filed a felony complaint on March 3, 2015, charging Holmes with one count of manufacturing methamphetamine (§ 11379.6, subd. (a), count 1) and one count of possessing methamphetamine for sale (§ 11378,

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<sup>1</sup> Further statutory references are to the Health and Safety Code, unless otherwise specified.

count 2). The complaint also alleged Holmes had a prior conviction for a serious or violent felony.

On May 21, 2015, Holmes pleaded guilty to both counts and agreed to a five-year sentence. Pursuant to the plea agreement, the prior conviction allegation was dismissed, and Holmes admitted the remaining allegations in the complaint. The trial court examined Holmes and found the plea had been knowingly, voluntarily, and intelligently made. The court released Holmes on bail pending sentencing pursuant to a *Cruz* waiver, explaining Holmes could face a seven-year eight-month sentence, were he to fail to appear for sentencing or commit another crime in the interim. (*People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5; *People v. Vargas* (2007) 148 Cal.App.4th 644, 649-650.) Nine days after his release on bail, Holmes was arrested for possessing and transporting methamphetamine (case no. '079, *infra*).

On October 2, 2015, Holmes filed a handwritten motion to withdraw his guilty plea. He argued he suffered ineffective assistance of counsel because his attorney failed to object to the traffic stop as unlawful. While admitting he had a parole search condition, Holmes averred his counsel failed to investigate whether the search was arbitrary, harassing, or motivated by animus toward Holmes. Holmes also argued detectives asked him to identify his house key without first issuing advisements under *Miranda v. Arizona* (1966) 384 U.S. 436 and that his counsel failed to move to suppress evidence later recovered from his garage. Finally, Holmes argued he accepted the plea agreement while under the influence of methamphetamine and signed that he was sober under penalty of perjury solely to avoid self-incrimination.

At the sentencing hearing on November 4, 2015, the trial court asked Holmes and his counsel about the handwritten motion, noting it could be construed as a motion to withdraw the plea or as a *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). Holmes told the court he was "just grasping at straws" and did not intend to make either motion; he stated he was instead prepared to proceed with sentencing on his guilty plea. Holmes's counsel sought to transfer the case to El Cajon to be considered with cases '079 and '714 (*infra*); the court denied the request and proceeded to sentencing.

The court found Holmes violated the conditions of his *Cruz* waiver when he was arrested and charged with possessing and transporting methamphetamine after his release on bail. As a result, the court exercised its discretion to impose additional time beyond the five-year sentence stipulated in the plea agreement. The court sentenced Holmes to a five-year middle term in state prison on count 1 and a consecutive eight-month term (one-third the two-year middle term) on count 2. The court awarded Holmes 80 days of custody credit and 80 days of conduct credit, for a total of 160 days of presentence credit.<sup>2</sup> The court also imposed various fines and fees, including a \$3,000 restitution fine (Pen. Code, § 1202.4, subd. (b)) and parole revocation fine in the same amount (Pen. Code, § 1202.45), \$205 lab fee (§ 11372.5, subd. (a) [inclusive of penalty assessments]), \$615 drug program fee (§ 11372.7, subd. (a) [inclusive of penalty assessments]), \$80 court operations assessment (Pen. Code, § 1465.8), and

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<sup>2</sup> Holmes was initially credited with 73 days of custody credit and 72 days of conduct credit. However, the court granted appellate counsel's request for correction and issued an amended abstract of judgment on May 13, 2016.

\$60 conviction assessment (Gov. Code, § 70373).<sup>3</sup> On December 23, 2015, the court ordered the sentence to run concurrent to the sentence imposed in case '714, *infra*.

B. *Case No. SCE351079 ('079)*

On May 30, 2015, Holmes was stopped by private security guards at the Barona Indian reservation. Holmes told the guards he was walking to the casino, and they offered him a ride. One of the guards noticed Holmes wore a GPS monitoring device around his ankle. Holmes explained his parole status and denied having an outstanding arrest warrant. While waiting for confirmation from the Sheriff's Department, the guards searched the area they found Holmes. They discovered a small black bag with a digital scale, two syringes, a broken methamphetamine pipe, and three bags containing 99.2 grams of methamphetamine. Holmes initially denied owning the bag, later said the bag was his, and then gave further conflicting statements about the bag. As the guards did not hear back from the Sheriff's Department, they allowed Holmes to leave.

Later that day, Lakeside Sheriff's Deputy Jacob Sanchez spoke to the private security guards and recovered the black bag and its contents. That evening, Deputy Darin Smith conducted a traffic stop on a car in which Holmes was traveling. Deputy Sanchez arrived and arrested Holmes.

On June 2, 2015, Holmes was charged by felony complaint with one count of transporting a controlled substance for sale (§ 11379, subd. (a)) and one count of

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<sup>3</sup> The original abstract of judgment indicated \$10,000 restitution and parole revocation fines (Pen. Code, §§ 1202.4, subd. (b), 1202.45). The court granted appellate counsel's request to amend the abstract of judgment to reflect the \$3,000 restitution and parole revocation fines ordered by the court.

possessing a controlled substance for sale (§ 11378). The complaint further alleged Holmes was not transporting the methamphetamine for personal use and that he had a qualifying possession for sale prior, six prison priors, an out-on-bail enhancement, and a strike prior. On June 3, 2015, Holmes entered a plea of not guilty and denied the allegations in the complaint.

On August 12, 2015, Holmes filed a motion to suppress the evidence pursuant to Penal Code section 1538.5. Holmes argued the security guards at the Indian reservation violated his Fourth Amendment rights. The People opposed his motion, arguing the Fourth Amendment did not apply to conduct by private security guards. Before the motion could be heard, Holmes changed his plea.

On August 27, 2015, Holmes pleaded guilty to both counts and admitted all of the allegations in the complaint. The trial court informed Holmes that he faced a 19-year sentence with his prison priors and strike but stated he was inclined to impose an 8-year sentence at 50 percent, as stipulated in the plea agreement. The court found Holmes understood the charges and the consequences of his guilty plea and found a factual basis for each plea.

The court released Holmes on bail pending sentencing, noting that pursuant to the *Cruz* waiver, he could face the full 19-year sentence if he failed to appear for sentencing or committed another crime in the interim. One day after his release on bail, Holmes was arrested for possessing methamphetamine (case '714, *infra*).

On October 30, 2015, Holmes filed a *Marsden* motion to relieve his appointed trial counsel. Holmes argued he suffered ineffective assistance because his trial counsel did

not move to suppress the evidence found by the security guards. Holmes's counsel informed the court he *had* filed a suppression motion but that there were many ways to lose it, whereas the stipulated 8-year term at 50 percent offered advantages. He stated he and Holmes had thoroughly discussed the risks associated with the pending motion to suppress and the consequences of accepting or rejecting the plea. He further stated Holmes did not seem to have difficulty communicating due to drug use.

The court rejected Holmes's claim he was not sober when signing the plea agreement, noting he initialed the box in the plea agreement that stated: "I am sober and my judgment is not impaired. I have not consumed any drug, alcohol or narcotic within the past 24 hours." Holmes argued he had initialed this box solely to avoid self-incrimination, but the court stated he was under no obligation to sign the plea agreement. The court denied Holmes's *Marsden* motion, finding he had not shown counsel rendered ineffective assistance.

On December 23, 2015, the trial court held a sentencing hearing in cases '079 and '714. The court sentenced Holmes to a one-year state prison term in '079, to be served consecutive to the sentence imposed in '714. The court awarded 51 days of custody credit and 50 days of conduct credit, for a total of 101 days of presentence credit. The court also imposed various fines and fees, including a \$1,000 restitution fine (Pen. Code, § 1202.4, subd. (b)) and parole revocation fine in the same amount (Pen. Code, § 1202.45), \$205 lab fee (§ 11372.5, subd. (a) [inclusive of penalty assessments]), \$615 drug program fee (§ 11372.7, subd. (a) [inclusive of penalty assessments]),

\$120 court operations assessment (Pen. Code, § 1465.8), and \$90 conviction assessment (Gov. Code, § 70373).

C. *Case No. SCE353714 ('714)*

On August 28, 2015, San Diego County Sherriff's Department detectives apprehended Holmes as he left a pharmacy. Detectives knew Holmes was subject to a search condition due to his parole status. A search revealed 28.5 grams of methamphetamine, a glass pipe, digital scale, and \$117 in cash.

At the preliminary hearing on September 15, 2015, Holmes pleaded not guilty to a one-count information charging him with possession of a controlled substance for sale (§ 11378). Holmes denied the two possession for sale priors, six prison priors, out-on-bail enhancement, and strike prior alleged in the information.

At the hearing on December 23, 2015, the trial court indicated it was inclined to impose a total sentence of 10 years at 80 percent for both '079 and '714, if Holmes intended to plead guilty in '714. Thereafter, Holmes pleaded guilty and admitted all the allegations in the information. The court found a factual basis for each admission and determined Holmes understood the nature of the charge and allegations and the consequences of his guilty plea.

The court sentenced Holmes to a total term of nine years in '74 to run concurrent to the sentence in '095: double the three-year upper term for possessing methamphetamine for sale with a strike prior (§ 11378; Pen. Code, §§ 667, subds. (b)-(i), 1170, subd. (h)(1)), enhanced by a consecutive one-year term for the prison prior (Pen. Code, § 667.5, subd. (b)), and a consecutive two-year term for the out-on-bail



enhancement (Pen. Code, § 12022.1, subd. (b)). The court struck the five remaining prison priors and awarded Holmes 236 days of presentence credit, consisting of 118 days each of conduct and custody credit.

D. *Appeal*

In January 2016, Holmes appealed. He requested a certificate of probable cause, asserting ineffective assistance of counsel based on his trial counsel's failure to suppress evidence and contending the sentences imposed deviated substantially from the stipulated terms. The trial court granted his certificate of probable cause on February 22, 2016, finding reasonable constitutional, jurisdictional, or other grounds for appeal.

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and proceedings before the trial court. Counsel presented no argument for reversal but asked this court to review the entire record for error in accordance with *Wende, supra*, 25 Cal.3d 436. Pursuant to *Anders, supra*, 386 U.S. 738, counsel identified the following as issues that "might arguably support the appeal": (1) ineffective assistance of counsel, (2) the voluntariness of the guilty pleas, (3) the fines and fees imposed and custody credits awarded, and (4) the denial of Holmes's *Marsden* motion. We granted Holmes permission to file a supplemental brief on his own behalf, but he has not responded.

A review of the entire record pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738, including the issues referred to by appellate counsel, has disclosed no reasonably arguable appellate issues. Holmes has been adequately represented by counsel on this appeal.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.